90-104

Supreme Court, U.S.
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NO.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

JOHN M.,

PETITIONER

-v-

PAULA T.,
and
MICHAEL T.,

RESPONDENTS

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

The basic questions presented for Review are as follows:

1. Whether, in light of the fact that a putative Father in Pennsylvania has standing to litigate a claim that he is the biological father of a child born to a woman while she was married to another, Respondent-Husband should be compelled to submit to a blood test when good cause is shown as per Pennsylvania law.

2. Whether the Constitutional guarantees of procedural and substantive rights to due process and equal

protection prohibit the Supreme Court of Pennsylvania from creating artificial barriers making it impossible for a contending biological father to litigate his interest in a child born to a woman married to another.

3. Whether the Constitutional guarantees of procedural and substantive rights to due process and equal protection are violated when only a scientific test (blood tests) can overcome a presumption; when these tests are permitted under the Uniform Act on Blood Tests to Determine Paternity under 42 Pa. C.S.A. § 6133 et seq; when the

tests are also authorized upon good cause shown under Pennsylvania Rule of Civil Procedure 4010(a) and good cause is shown; and when not allowing the testing does not even permit the Court to determine that which is in the best interest of the child.

4. Whether the "presumption that a child born of a married woman is a child of the marriage" is so strong that a "third party who stands outside the marital relationship should not be allowed, for any purpose, to challenge the husband's claim of parentage" as per the Concurring Opinion joined in by all

of the Supreme Court of Pennsylvania Justices in John M. v. Paula T. and Michael T., 571 A.2d 1380 at 1389 (1990).

5. Whether the Constitutional guarantees of procedural and substantive rights to due process and equal protection for a contending biological father are violated by not ordering blood tests when the estoppel cases cannot even apply "for it does not seem that appellee [Petitioner herein] took any action through the years that was inconsistent with his assertion that he is the biological father of the child in

question as stated in John M. v. Paula T. and Michael T., supra at 1387-1388.

LIST OF ALL PARTIES

The Parties to the proceeding in the Supreme Court of Pennsylvania, from which Court judgment is sought to be reviewed, are John Miller (Plaintiff at the trial Court, Appellant in the Superior Court of Pennsylvania, and Appellee in the Supreme Court of Pennsylvania) and Paula Tomlinson and Michael Tomlinson (Defendants at the trial Court, Appellees in the Superior Court of Pennsylvania, and Appellants in the Supreme Court of Pennsylvania). The caption was changed to read "John M. v. Paula T. and Michael T." by the Superior

Court of Pennsylvania.

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REFERENCE TO REPORTS OF OPINIONS

In the Common Pleas Court of Delaware County, Pennsylvania, this matter was reported at No. 85-6320 in the Delaware County Legal Journal. The Superior Court of Pennsylvania assigned this matter No. 2425 Philadelphia, 1987 and the Opinion was filed on August 18, 1988 and reported at 546 A.2d 1162 (1988). The Supreme Court of Pennsylvania assigned this matter No. 31 E.D. Appeal Docket 1989 and the Opinion dated March 19, 1990 has just been reported at 571 A.2d 1380 (1990).

STATEMENT OF GROUNDS FOR JURISDICTION

The Judgment that the Supreme Court of the United States is being respectfully requested to review is the Judgment of the Supreme Court of Pennsylvania dated March 19, 1990. There are no outstanding rehearings or extensions of time within which to file this Petition for a Writ of Certiorari.

In the instant matter, the Supreme Court of Pennsylvania reversed the Superior Court of Pennsylvania's decision that "Guarantees of due process and equal protection command that the courts shall not create artificial

barriers which will make it impossible for a contending biological father to litigate his private interest in a child whom he allegedly has sired" and that Petitioner herein could not hope to prove his claim and is "out of Court" to rebut the "presumption of legitimacy" without Respondent-Husband submitting to scientific evidence (blood tests). John M. v. Paula T., 546 A.2d 1162 at 1167, 1168 (1988). This matter has strong implications dealing with the Constitutional rights of due process and equal protection not previously dealt with by the Supreme Court of the United

States and beyond the questions and fact pattern presented in Michael H. v. Gerald D., 491 U.S. ____ , 109 S.Ct. 2333, 105 L.Ed 2d 91 (June 15, 1989).

Thus, this Honorable Supreme Court has jurisdiction since a state court of last resort has decided an important issue of federal law not previously settled, but which should be settled by this Honorable Court and this matter can be differentiated factually and due to the Pennsylvania statutes from Michael H. v. Gerald D. as above.

CONSTITUTIONAL PROVISIONS INVOLVED

The instant matter deals primarily with the Fifth and Fourteenth Amendment rights of Due Process and Equal Protection under the law.

The Fifth Amendment, adopted in 1791 and interpreted ever since states:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken

for public use, without just compensation.

The Fourteenth Amendment, Section 1, adopted in 1868 and likewise interpreted ever since, states:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of laws.

STATEMENT OF THE FACTS OF THE CASE

This matter is presented to this Honorable Supreme Court upon this Petition for a Writ of Certiorari after the Supreme Court of Pennsylvania reversed the Judgment of the Superior Court of Pennsylvania, which had, in turn, reversed and remanded the Judgment of the Court of Common Pleas of Delaware County, Pennsylvania.

Procedurally, this matter began by the filing of a Petition for Partial Custody or Visitation with Heather T. against Paula T. on May 9, 1985, by Petitioner herein. After numerous

conferences, Petitioner filed an Amended Petition to include Michael T. as well as Paula T. as a party to the action. On December 17, 1985, Petitioner filed a Motion for Physical Examination (blood tests) of Michael T. pursuant to Pa. R.C.P. 4010(a). Said Motion was subsequently denied by the Honorable Melvin G. Levy of the Delaware County Court of Common Pleas and denied at trial by Judge Wright. (R.9a - R.12a).

A hearing was held on the issue of whether Petitioner was the natural father of the minor child on March 4, 1986, before the Honorable Robert A.

Wright. Post-trial memoranda were filed by counsel and Judge Wright issued an Order dated September 19, 1987. The Order was amended by Judge Wright on October 14, 1986, and that Order was made a Final order by Judge Wright on July 29, 1987, so that an Appeal could be made by Petitioner to the Superior Court of Pennsylvania. All counsel in this matter entered into a Stipulation made an Order of Court to that effect on July 29, 1987. Thus, the initial request for the blood test was filed in the Court of Common Pleas of Delaware County, Pennsylvania on December 17, 1985, and was again denied

at the time of trial and in Judge Wright's Opinion (included in the Appendix herein) dated November 12, 1987, despite that fact that on page 33 of his Opinion, Judge Wright stated that "It may well be that Mother cannot truthfully say that Plaintiff or Husband is the father of the child".

The matter was appealed to the Superior Court of Pennsylvania and the Constitutional matters were raised by the Appellant (Petitioner herein) in his Brief and in oral argument. The Superior Court in its Opinion (included in the

Appendix herein) at pages 23 through 27 reasoned that:

> Having recognized the right of the putative father to litigate his claim, however, we cannot then take away from him the same right to prove his claim as other litigants enjoy. Guarantees of due process and equal protection command that the courts shall not create artificial barriers which will make it impossible for a contending biological father to litigate his private interest in a child whom he allegedly has sired. R. McG. v. J.W., 200 Colo. 345, 615 P.2d 666 (1980) (statute which deprived father of access to courts to assert claim of paternity violates principles of equal protection); Anonymous v. Anonymous, 472 So.2d 640 (Ala.Civ.App. 1984)(putative father of child born to married woman is entitled to opportunity to present evidence to rebut presumption that mother's husband was father). Thus, it seems clear that Pa.R.C.P. 4010(a) must be applied evenhandedly and, indeed, ungrudgingly, in the case of a putative father who is required to

> rebut a presumption of legitimacy in order to establish his claim of paternity in the case of a child born to a married woman. . . . In the instant case, appellant cannot hope to prove his claim without scientific testing.

Without the blood testing of Michael T., John M. cannot hope to prove his claim and is effectively out of Court.

Again, the issue was raised in the Supreme Court of Pennsylvania where the Opinion of the Court on page 47 (as included in the Appendix herein) was that "paternity had already been established by the presumption that the child is the child of the marriage of Paula and Michael T.". On page 5 of the Concurring

Opinion (as also included in the Appendix herein), in which all the Justices joined, went on to state that, "Thus a third party who stands outside the marital relationship should not be allowed, for any purpose, to challenge the husband's claim of parentage. I believe the presumption in this situation is irrebuttable and conclusive . . .". Thus, the federal questions as to due process and equal protection under the law have been raised in each and every Court below.

A chronological statement of the facts relating to this matter begins with

the Petitioner and Respondent Paula T. (hereinafter referred to as "Respondent mother") having met in September, 1977 at work while both parties were single. Their relationship began by having lunch together and he took her home after the office Christmas party in 1977. They saw each other socially, fell in love, and became intimate until just before September, 1978, when Respondent mother got married to Respondent, Michael T. (hereinafter referred to as "Respondent husband"). Prior to her marriage, Petitioner and Respondent mother discussed her calling off the marriage,

but she said her parents ". . . would kill her if she called it [the marriage] off." (R.16a - R.18a).

However, in early 1979, the Petitioner and Respondent mother resumed their sexual relationship. They were intimate with one another on approximately one or two occasions per month through September, 1983. During this time period, Petitioner was under the impressions that he and Respondent mother would be sharing their lives with one another. (R.20a - R.22a).

Petitioner and Respondent mother were intimate somewhat more frequently

during January and February, 1981. Up until that time, they used no form of birth control except withdrawal. (R.34a). At the trial, Petitioner provided specific dates obtained from motel receipts or general time frames of their sexual meetings. (R.21a - R.31a). In January and February, 1981, they did not use protection or withdrawal since she told him not to withdraw. (R.35a). When Respondent mother informed Petitioner in March 1981 that she was pregnant, the two of them discussed the child as his. They again discussed her getting a divorce. (R.39a - R.40a). Respondent mother

called Petitioner on November 3, 1981, the morning she was going to the hospital to give birth to the minor child, and she called later that day about a time he could go to the hospital to visit. Petitioner visited the child and mother at the hospital and showed pictures to prove this at the time of trial. After the birth of the child, Petitioner and Respondent mother continued to discuss that the child was theirs. (R.43a - R.47a).

Petitioner and Respondent resumed their physical relationship and discussed being together through

September, 1983. Petitioner saw the minor child, Heather T., at his apartment, in a park, and at other locations as often as possible and showed photographs at the time of trial to prove this. (R.52a - R.60a). After the relationship between the Petitioner and Respondent mother ended, Petitioner continued to demand visits with Heather T. and saw her from time to time. (R.67a-R.68a). Finally, in December, 1984, Petitioner and Respondent mother agreed to obtain a Parentage Testing Report from Penn Jersey Regional Red Cross Blood Service. (R.76a). They did get the

comprehensive tests done and the result was that "the probability that John M. is the father of Heather T. is 97.471% as compared to a random man. The alleged father is 38 times more likely to provide the required genes than is a random man." (R.114a).

Petitioner has bought gifts for the minor child but was unable to support the child since Respondent mother said that she could not explain to her husband from where the support was coming. He has opened a trust account for the child. (R.72a - R.73a). He produced correspondence at the time of trial from

Respondent mother and her children confirming the relationship. He produced a Father's Day card from the minor child that was obviously sent by Respondent mother. (R.88a - R.89a). During the course of the hearing, Petitioner testified with the use of extensive documentary evidence including photographs, correspondence and motel receipts to verify dates, places and state of mind. (R.21a - R.31a, R.52a - R.60a, R.88a - R.89a).

Petitioner is requesting this Honorable Supreme Court to grant a Writ

of Certiorari to rule on these unique Constitutional issues.

ARGUMENT

"It may well be that Mother cannot truthfully say that Plaintiff [John M.] or Husband [Michael T.] is the father of the minor child". This statement made by the Honorable Robert A. Wright, the trial judge from the Court of Common Pleas of Delaware County, Pennsylvania, on page 33 of his Opinion dated November 12, 1987 (a copy of which has been made part of the Appendix herein) is central to the issues in this matter. The mother may not be sure just who is the father of Heather T., but John M. is certain that he is the biological

father of the child and Michael T. has through the five years of litigation stated that he believes himself to be the biological father. Nobody, including the minor child, can ever fully be sure who is the biological father of Heather T. without being permitted to present the best possible evidence in Court. Obviously, in the instant matter where mother, child, and John M. have already participated in HLA blood testing demonstrating a 97.471% probability that John M. is the biological father of the minor child, the best evidence would be an HLA (or DNA) blood testing of Michael

T. This would afford the contending biological father his Fifth and Fourteenth Amendment rights. Then the trial court have the appropriate information it needs to determine who actually is the biological father and only then would the Court be able to hold a hearing to determine if visitation by the minor child with the contending biological father is in the best interests of the child. Unless we learn through the scientific process whether the contending biological father is indeed the child's actual biological father, the best interest of the chid can

never be examined by the Court. With all that said, and without repeating the entire fact pattern reported elsewhere in this Brief, we must now examine the background of this matter in the Courts of Pennsylvania.

At the trial Court level, Petitioner filed a proper and timely Motion for Physical Examination pursuant to Pa. R.C.P. 4010(a) for Respondent husband to have a blood test to determine parentage. Rule 4010(a) reads as follows:

> When the mental or physical condition (including blood group) of a party, or of a person in the custody or under the legal control of a party, is in

> controversy, the court in which the action is pending may order the party to submit to a physical or mental examination by a physician or to produce for examination the person in his custody or legal control The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions and scope of the examination and the person or persons by whom it is to be made.

This Rule was so amended on November 20, 1978, with an effective date of April 16, 1979. By a Supreme Court of Pennsylvania Order dated November 8, 1982, effective January 1, 1983, Pa. R.C.P. 1915.8(a) permitted testing as ordered by the Court specifically in custody and visitation

matters. Pa. R.C.P. 4001(a)(2) states that Pa. R.C.P. 4010(a) does not apply to custody matters "except to the extent prescribed by the rules governing [that] action." Pa. R.C.P. 1915.5(c) allows discovery in custody matters by special Order of Court and the Explanatory Note to Rule 4001 states that it is to "be freely given where it is essential to a just disposition of the matter."

Rule 4010(a) clearly refers to parentage testing in the body of the Rule. The Rule goes on to state that there must be "good cause shown". In the instant matter, there is certainly good

cause shown to require a parentage test to settle the biological paternity of the minor child at this point in her life. The factual pattern presented before the lower Court demonstrates clearly that there would be sufficient reason to believe that the Petitioner is the natural father of the minor child herein.

Without repeating the entire fact pattern contained in Statement of Facts of the Case herein, several relevant facts which give rise to good cause for the blood testing include the fact that both Petitioner and Respondent mother admitted that there was a

relationship, including a sexual relationship, that existed over a period of years, both before Respondents were married and during their marriage. Petitioner testified that there was a regular, steady physical relationship from early 1978 until September, 1983. Petitioner further testified that he and Respondent mother had discussed all through their relationship the prospect of her divorcing and their marrying. (R.20a - R.22a, R.39a - R.40a). Further, Petitioner testified that they had been intimate with one another during January and February 1981 and gave some specific

dates or approximate times by citing references and how he remembered the date. (R.35a - R.39a). Both agreed that January 16, 1981, was one time during which they were intimate. (R.35a & R.134a). Petitioner further testified that he and Respondent mother had discussed that the child was his and that he had seen and visited the child on numerous occasions after her birth (including visits at the hospital) and through Easter, 1985. (R.39a - R.40a, R.43a - R.47a, R.67a - R.68a). Petitioner produced pictures and correspondence substantiating these claims (including a

Father's Day card). (R.52a - R.61a). Further, there is no doubt that a blood test was voluntarily performed on Petitioner, Respondent mother, and the minor child in December, 1984, with the probability that Petitioner is the father of the minor child being 97.471% as compared to a random man. These tests demonstrate that Petitioner is 38 times more likely to provide the required genes than is a random man. (R.114a).

In the light of such a strong fact pattern intertwining the lives of Petitioner and Respondent mother, it would seem quite natural that the only

way to determine the minor child's natural father would be for the Respondent husband to submit to a parentage test. Petitioner herein concedes that if the testing of Respondent husband does not exclude him as the father of the minor child, that the presumption that a child born to a married woman is a child of the marriage[1]

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[1] This presumption has always been referred to in Pennsylvania as the "presumption of legitimacy" until Justice Larson in his Supreme Court of Pennsylvania decision in the instant matter stated in part as follows: "Since the legal distinction between 'legitimate' and 'illegitimate' children has now been eliminated in the Commonwealth by statute, the phrase 'presumption of legitimacy'

is so strong as to probably defeat Petitioner's claim. However, all parties involved herein, including the minor child, have the right to ascertain whether or not Respondent father is excluded or not. Otherwise, it would circumvent the rights afforded to

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is now meaningless. Thus, this Court will no longer use the phrase 'presumption of legitimacy' to describe the 'presumption that a child born to a married woman is a child of the marriage,' and therefore of the woman's husband." John M. v. Paula T. and Michael T., 571 A.2d 1380 at 1383, 1384 (1990). The presumptions above will be used interchangeably in this Brief due to the fact that all prior case law in Pennsylvania refers only to the "presumption of legitimacy".

Petitioner to prove that he is an unwed father and it has long been recognized that " . . . unwed fathers have cognizable and substantial rights as to their children." Stanley v. Illinois, 405 U.S. 645, 92 S.Ct. 1908 (1972).

John M. has been properly permitted to demonstrate a degree of probability that he is the father of the minor child, however he has been unable to prove that Michael T. is excluded under the HLA tests or to prove the issue with a greater degree of certainty under the DNA Fingerprinting tests, which are currently available and quite definitive.

The results of any blood testing are deemed to be only one factor to be considered by the Court in making its determination. Nixon v. Nixon, 354 Pa. Super. 232, 511 A.2d 847 (1986). However, Pennsylvania has adopted the Uniform Act on Blood Tests to Determine Paternity at 42 Pa. C.S. § 6131 et seq and § 6137, which is headed "Effect on Presumption of Legitimacy", specifically states:

> The presumption of legitimacy of a child born during wedlock is overcome if the court finds that the conclusions of all the experts as disclosed by the evidence based upon the tests show that the husband is not the father of the child.

Section 6133 of the Act allows the Court to order "the mother, child, and alleged father to submit to such test". These sections demonstrate that there has been at least some specific changes or relaxation in the test to overcome the strong presumption of legitimacy. The Pennsylvania Supreme Court and Superior Court differ as to the extent of the relaxation, but both agree that there is a relaxation.

Respondents, in their Answer to Petitioner's Motion to Compel Physical Examination at the trial Court level, cited three (3) cases; i.e. Commonwealth

ex rel. O'Brien v. O'Brien, 190 Pa. 55, 136 A.2d 451-453 (1957), Commonwealth v. Goldman, 199 Pa. Super. 274, 184 A.2d 351 (1962), and Burston v. Dodson, 390 A.2d 216, 257 Pa. Super. 1 (1978). It should be noted that all three of these above cited cases, including Burston v. Dodson, which was argued on December 8, 1976, and decided on July 12, 1978, were decided prior to the enactment of the amendment of Rule 4010(a). Thus 4010(a) would be applicable and the relevant blood groupings, which are in controversy, could have or should have been tested on

Respondent husband since good cause was shown and proper notice was given.

The questions of applying Rule 4010(a) evolves largely upon statutory interpretation due to the uniqueness of this issue and the lack of case precedents in Pennsylvania. There is no escaping the strong presumption of legitimacy that exists in the Commonwealth of Pennsylvania. Connell v. Connell, 329 Pa. Super. 1, 477 A.2d 872 (1984). Further, the Burston case held that the presumption of legitimacy can be rebutted only by evidence which is clear and convincing.

However, Petitioner contends that the Court in this matter needs to consider whether one contending to be the natural or biological father of a child born to a mother during her marriage to another man can possibly rebut the presumption without being able to present all possible evidence including blood tests of all relevant parties. The constitutional guarantees of due process and equal protection must be weighed. Williams v. Milliken, 507 A.2d 918 (1986). Contained in the concurring opinion in Williams as filed by Judge Wieand is his concern that a putative

father be given the due process and equal protection guaranteed by the Constitution while the legitimacy of children continues to be protected by the strong presumption.

While there is no claim that Petitioner herein has been altogether denied access to the Courts, the fact that he has been denied the opportunity to present evidence to rebut this strong presumption is a violation of Petitioner's rights. In his concurring opinion in Williams, Judge Wieand lists the cases below to support the proposition that "it is not necessary to

deny a contending biological father access to the courts in order to preserve the interests of the state":

> Guarantees of due process and equal protection add weight to the need to allow a contending biological father to litigate his private interest in the children whom allegedly he has sired. Anonymous v. Anonymous, 472 So.2d 640 (Ala.Civ.App. 1984) (putative father of child born to married woman is entitled to opportunity to present evidence to rebut presumption that mother's husband was father); In re Lisa R., 18 Cal.3d 636, 532 P.2d 123, 119 Cal.Rptr. 475, cert. denied, 421 U.S. 1014, 95 S.Ct.2421 44 L.Ed.2d 682 (1975) (unwed father has standing to challenge statutory presumption that child of married woman is legitimate issue of marriage where both mother and presumed father are dead and state has custody of child); R. McG. v. J.W., 200 Colo. 345, 615 P.2d 66 (1980)

(statute which deprives putative father of access to courts to assert claim of paternity violates principles of equal protection); Pritz v. Chesnul, 106 Ill.App.3d 969, 62 Ill.Dec. 605, 436 N.E.2d 631 (1982) (putative father of illegitimate child has constitutional right to legal forum with due process to establish natural parentage and paternal rights, Cf. Smith v. Lane, 101 Misc.2d 615, 421 N.Y.S.2d 786 (1979) (putative father allowed to sue to establish paternity--no discussion of standing); Rayson v. Gabby, 57 A.D.2d 437, 395 N.Y.S.2d 290 (1977) (same). See also: Lehr v. Robertson, 463 U.S. 248, 103 S.Ct. 2985, 77 L.Ed.2d 614 (1983), Stanley v. Illinois, 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972). Contra: P.B.C. v D.H., supra; Petitioner F. v. Respondent R., 430 A.2d 1975 (Del. 1981), A v. X, Y, and Z, 641 P.2d 1222 (Wye. 1982).

The Superior Court of Pennsylvania stated in its Opinion in the instant matter that since the holding in Williams that a putative father has standing to litigate a claim that he is the biological father of a child born to a woman married to another that:

> . . . we cannot then take away from him the same right to prove his claim as other litigants enjoy. Guarantees of due process and equal protection command that the courts shall not create artificial barriers which will make it impossible for a contending biological father to litigate his private interest in a child whom he allegedly has sired". John M. v. Paula T. and Michael T., 546 A.2d 1162 at 1167 (1988).

At this point in time, John M. has been denied the right to prove his claim,

thus, he cannot even step in the door of the Court House to discuss whether or not his visitation with the minor child would be in the best interest of the child.

The Supreme Court of Pennsylvania has weighed John M.'s Constitutional guarantees of due process and equal protection against Michael T.'s rights of privacy and the preservation of the family and has found that John M. falls short. They liken this case to the series of estoppel cases, but then admit that those cases are not on point ". . . for it does not seem that appellee [John M.] herein took any action through the

years that was inconsistent with his assertion that he is the biological father of the child in question". John M. v. Paula T., supra at 1387, 1388. Thus, John M.'s actions have always been consistent with being the biological father of the child.

Despite John M.'s consistency with the fact that he is the biological father of the child, the Supreme Court of Pennsylvania in a Concurring Opinion written by Chief Justice Nix and joined in by every other Justice on the Court stated that the "presumption of legitimacy was "absolute" and that the

Uniform Act on Blood Tests to Determine Paternity referred to above "merely provides a mechanism through which an alleged father can accumulate evidence of paternity". Finally, Chief Justice Nix states "Thus a third party who stands outside the marital relationship should not be allowed, for any purpose, to challenge the husband's claim of parentage". John M. v. Paula T., supra at 1388, 1389. Now, the Court is no longer weighing rights but despite constitutional and statutory rights is making a decision that the contending biological father is not allowed "for any

purpose" to enter the Court. Again, in the instant case, this means the door to the Courts do not close on John M. or anybody else with a similar problem, but that they were never open at all to prove his contention. And, after all, the truly important issue is the best interests of the child and that will never ever be addressed if John M. cannot even address the presumption with proof if good cause is shown.

The Constitutional rights of due process and equal protection have been dealt with extensively by the Supreme Court of the United States ever since

they became rights. Recently the Court has dealt with due process and equal protection issues in a similar but distinguishable matter, Michael H. and Victoria D. v. Gerald D., 491 U.S. _____, 109 S. Ct. 2333, 105 L.Ed.2d 91 (1989). This matter, decided by a 5-4 plurality, ruled that the conclusive presumption in California Evidence Code § 621 was not unconstitutional. The dangerous precedent set by a strict reading of this case may be what caused the Supreme Court of Pennsylvania to decide to close the doors on John M. However, as pointed out by Justice Brennan in his dissent in

Michael H., five Justices did not rule out the possibility that a contending biological father might have a constitutionally protected interest in his relationship with his child.

In Michael H., the California statute allowed the matter to be summarily dismissed. This is not (or at least was not) the case in Pennsylvania where, in the instant matter, the door to the Courts was opened with the pretext of being able to receive a full trial and then a barrier (not being able to obtain blood tests) was placed in the way causing the trial to be somewhat of a

sham since John M. was unable to prove that he was the biological father without the blood test being performed on Michael T. Again, the test was a rebuttable presumption and the putative father would have standing to then litigate his claim. Williams v. Milliken, supra. If one is given the right to rebut a presumption and would have standing to proceed, due process arguments scream for the matter to be heard and to allow the party the ability to gather whatever evidence is necessary. In this instant matter, the test was whether or not good cause was shown. We have previously indicated that

good cause was shown, and even the Supreme Court of Pennsylvania agreed that this was not an "estoppel" type case since John M. was consistent in his claim of biological fatherhood. The 97.471% probability of being the father as per the HLA results, the receipt of a Father's Day card, the call from the mother before going into the hospital to give birth and John M.'s trip to the hospital on the day of the child's birth are all factors to demonstrate the good cause. Why have a good cause requirement if the upshot of showing good cause is that you cannot proceed with the case?

It is important to note again that any decision on whether or not John M. is the biological father will not determine visitation rights. There would still have to be a hearing as to the best interests of the child. However, John M. has a right to prove that he is the biological father and Heather T. has the right to know before she is an adult that John M. is her father.

It would then only stand to reason that Michael T. should be ordered to submit to blood testing since Paula T. cannot be sure who is the father of Heather T.; since the presumption of

legitimacy can be rebutted if blood tests show that the husband is not the father of the child; and since if a blood group of a party is in controversy, the Court may order the party to submit to a blood test for good cause shown. Good cause has been demonstrated herein for the reasons particularized previously and due to the fact that John M. would not be able to obtain this information in any other way and without this information, essentially the doors to the Court would be forever closed as to John M. or anybody else occupying his position.

In this matter, the only possible evidence to rebut the presumption of legitimacy would be blood testing as is already permitted under Section 6131, et seq and for good cause under Section 4010(a). To force John M. to prove his claim before he can show "good cause" effectively takes away his right to a hearing to give him the appropriate opportunity to rebut the strong presumption of legitimacy. John M. must be given the opportunity to present his case and only by ordering the blood testing will his guarantees of due

process and equal protection be kept intact.

The Respondents in their Brief filed with the Supreme Court of Pennsylvania have agreed that John M. has the standing to litigate this issue and that he does enjoy the guarantees of due process and equal protection. They agree that he has the right to have his claim heard. Our disagreement with Respondents is that they claim that he was given <u>every</u> opportunity to rebut the presumption of legitimacy. Without allowing him to have blood testing done on Michael T., which is provided for in

the statutes and case law, John M. is left without the opportunity to rebut the presumption of legitimacy and to bring this matter properly before the attention of the Court. Not allowing the blood testing effectively precludes him from litigating this matter and deprives him of liberty and denies him his Fifth and Fourteenth Amendment rights. We pray that this Honorable Court will allow this

matter to be heard and that the Writ of Certiorari will be granted.

Respectfully submitted,

MOSS AND MACKRIDES

By: Steven B. Moss
STEVEN B. MOSS, ESQUIRE
Attorney for Petitioner,
John M.

APPENDIX "A"

SUPREME COURT OF PENNSYLVANIA
Eastern District

John M.	:	No. 31 E.D. Appeal
	:	Docket 1989
	:	
v.	:	
	:	
Paula T. and	:	
Michael T.,	:	
Appellants		

JUDGMENT

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the order of the SUPERIOR COURT, be, and the same is hereby reversed, and the Order of the Court of Common Pleas of Delaware County is hereby reinstated.

/s/
Marlene F. Lachman, Esq.

Dated: March 19, 1990

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

JOHN M.,	:	No. 31 E.D. Appeal
	:	Docket 1989
Appellee	:	
	:	Appeal from the Judgment
v.	:	of the Superior Court,
	:	Entered on August 1 and
PAULA T., and	:	1988, at No. 2425 Phil.
MICHAEL T.,	:	1987, reversing the
	:	Judgment and Order of
	:	Appellants the Court of
	:	Common Pleas of Delaware
	:	County at No. 85-6320
	:	
	:	377 Pa. Super. 72, 546
	:	A.2d 1162 (1988)
	:	
	:	ARGUED: DECEMBER 12,
	:	1989

OPINION OF THE COURT[1]

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*I agree with the views expressed in Mr. Chief Justice Nix's concurring opinion and join in that opinion. The holdings of this marjority opinion is confined to the precise issues raised by the parties herein.

JUSTICE ROLF LARSEN

Filed: March 19, 1990

This appeal stems from a Petition for Custody and/or Visitation filed by John M., the appellee, wherein he sought to establish that he is the biological father of a girl-child born to Paula T. while she was married to Michael T., and wherein appellee sought to compel Michael T. to submit to Human Leukocyte Antigen (HLA) blood tests against his will. The issue presented is whether the trial court erred in refusing to order the husband to submit to such tests upon appellee's Motion for Physical

Examination pursuant to Pa.R.Civ.P. 4010(a).

Appellee John M. (the "putative father") and appellant Paula T. (the mother) became lovers at a time when the latter was engaged to marry appellant Michael T. (the "presumptive father"). Her relationship with appellee temporarily ceased in August, 1978, and Paula was married to Michael in September, 1978, Paula and Michael have lived together and have remained married since then.

In March, 1978, however, John and Paula resumed their relationship. This

relationship continued, on and off, until September, 1983 when it was finally terminated by Paula.

Throughout their marriage, Paula and Michael have lived together and have engaged in sexual intercourse on a regular and frequent basis. On June 6, 1980, Paula gave birth to the couple's first child (whose paternity is not at issue). In January-February, 1981, John and Paula engaged in sexual intercourse on several occasions without birth control precautions. During that same period, Paula and her husband, Michael were also engaging in sexual intercourse

regularly, about three to four times a week.

On November 3, 1981, Paula gave birth to her second child, the chid whose paternity is at issue (hereinafter referred to as "the Child"). Her husband Michael was in the delivery room and assisted in the Child's delivery. Subsequently, Paula gave birth to two additional children born to Michael (a girl and a boy), and these six (Paula, Michael, and their four children) have lived together continuously and have always presented themselves to the community as a family.

There was conflicting testimony at the trial regarding John's attempt to establish and develop a relationship with the Child. Essentially, John claimed to have visited mother and the Child at the hospital upon the Child's birth, and to have kept up a relationship with the Child and her mother. John also testified that Paula had acknowledged to him that he was the Child's father, and that he had offered to support the Child, which offer was refused because Paula would have been unable to explain the source of the support money to her husband. John established a trust fund

for the Child; however, at oral argument it was conceded that the trust was revocable at the will of the donor-John.

Paula admitted that she and John had sexual relations until December, 1981 (specifically including January-February of that year), that she remained friends with John until September, 1983, during which time John occasionally visited her and her daughters, but she did not recall ever having indicated to John that he was the Child's father.

Sometime in 1984, Paula refused to allow appellee to visit her and the Child. At appellee's insistence, Paula

agreed to submit to a blood test, and HLA blood testing was done on mother, the Child and appellee in December 1984. The results of the HLA blood tests, according to Dr. Sherwood, appellee's expert witness, a hematologist, were that "the probability of paternity . . . in this case was 97.47 percent. That is to say [appellee] is 97 percent more likely to be the true father of the Child than as a random man of the same race." Notes of testimony (N.T.) March 4, 1986, at 114. Dr. Sherwood also expressed his findings as showing that appellee was "38 times more likely to provide that assortment of

obligatory genes as is any random man." Id. Dr. Sherwood admitted, however, that science can only give an assessment of probability that a particular person is the biological father and that "we cannot say with definitiveness that he is in truth the true father." Id. Dr. Sherwood further testified that "in our experience this [97.47 percent probability] is perhaps in the mid range of results that one gets in this type of testing." Id. at 115. Michael declined to submit to a blood grouping test to determine the scientific probability of his being the Child's biological father.

Appellee filed a petition and amended petition against appellants seeking partial custody and/or visitation of the Child wherein appellee alleged that he was her father. On December 17, 1985, appellee filed a Motion for Physical Examination pursuant to Pa.R.Civ.P. 4010(a) wherein eh sought a court order to compel Michael T. to submit to blood testing, including HLA blood grouping tests. Said motion was denied pre-trial by the Honorable Melvin G. Levy of the Court of Common Pleas of Delaware County, and was again denied at trial on March 4,

1986 by the Honorable Robert A. Wright. N.T. id. at 10-12.

A hearing was conducted before Judge Wright at which the foregoing facts and testimony were placed upon the record. A final order was issued by Judge Wright on July 29, 1987, which affirmed an earlier order that appellee had not overcome the "presumption of legitimacy" (i.e., the presumption that a child born to a married woman is the child of the marriage - see note 2, infra), and that it would be unnecessary therefore to hold any additional hearings regarding visitation. Post-trial motions were

filed and denied. In its opinion in support of denial of post-trial motions, the lower court reaffirmed its refusal to compel the appellant-husband to submit to blood tests, and its determination that appellee had not overcome the "presumption of legitimacy."

John M. appealed to Superior Court which, on August 18, 1988, reversed the lower court, holding that the lower court abused its discretion in refusing to compel Michael T. to submit to blood tests.

This Court granted Paula and Michael T.'s petition for allowance of appeal on

February 27, 1989, and we now reverse the Superior Court.

Appellee predicated his motion to compel appellant-husband to submit to a blood test on Rule 4010(a) of the Pennsylvania Rules of Civil Procedure.[1]

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[1]Actually, Rule 4010 does not apply in an action for custody or visitation of minor child. Pa.R.Civ.P. 4001(a)(2). As a general rule, in such actions, there shall be no discovery unless authorized by special order of court. Pa.R.Civ.P. 1915.5(c). However, Rule 1915.8(a), which is applicable in custody proceedings, provides for "Physical and Mental Examination of Persons," and provides that when the mental or physical condition of a person is in controversy, the court "may order the child or the party to submit to a physical or mental examination by a physician or psychologist or both."

The explanatory note accompanying Rule 1915.8 explains that this rule is "similar

Rule 4010(a) provides as follows:

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to that provided by Discovery Rule 4010." One difference between the rules is that rule 4010 provides that the court may order such examination "only on motion for good cause shown," whereas Rule 1915.8 does not explicitly contain such "good cause shown" requirement. However, we will analyze the request for court-ordered blood tests in this case under Rule 4010, rather than the more appropriate Rule 1915.8, because appellee specifically made his motion pursuant to Rule 4010 and because the lower court and Superior Court analyzed the motion under Rule 4010. Moreover, the rules are indeed "similar, "and we believe that the "good cause shown" requirement which is explicit in Rule 4010 is implicit in Rule 1915.8. (See explanatory note to Rule 4010, which states: "(2) The amendment introduces a specific requirement of "good cause shown . . . ." Actually, this makes no change in present practice. Good cause and notice were implicit in the prior Rule. . . .").

PHYSICAL AND MENTAL EXAMINATION OF PERSONS

(a) When the mental or physical condition (including blood group) of a party, or of a person in the custody or under the legal control of a party, is in controversy, the court in which the action is ending may order the party to submit to a physical or mental examination by a physician or to produce for examination the person in his custody or legal control The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions and scope of the examination and the person or persons by whom it is to be made.

Plainly, Rule 4010(a) authorizes a court to grant a motion for physical examination of a party only "for good cause shown," and places the "good cause"

determination at the discretion of the court ("may order the party to submit"). In its opinion denying post-trial motions in this case, the lower court stated:

> The court did not abuse its discretion in refusing to order Husband to take a blood test. The explanatory note to Rule 4010 states "Good cause . . ." [is] "intended to protect parties against undue invasion of their rights to privacy." Where a husband is living with his wife, has never separated from her, is the undisputed father of her first child, was having intercourse with his wife three to four times a week when her second child was conceived, was at the hospital and took part in the delivery of the second child, considers himself to be the natural father of both children and husband, wife and children are living together in he community as a family unit, it certainly is an undue invasion of the husband's right to privacy to order him to take a blood test in proceedings commenced by a person who

> is alleging that person is the father of the wife's second child.

Slip op. at 13-14.

The lower court's refusal to compel appellant-husband to submit to blood tests was based upon the "presumption of legitimacy,"[2] one of the strongest

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[2]The "presumption of legitimacy" arose from the reluctance of the law to declare a child "illegitimate," because the status "illegitimate" historically subjected a child so labelled to significant legal and social discrimination. See, e.g., Michael H. v. Gerald D., U.S. , 109 S.Ct. 2333 (1989); Commonwealth ex rel. Leider v. Leider, 434 Pa. 293, 254 A.2d 306 (1969); Cairgle v. American Radiator Standard Sanitary Corp., 366 Pa. 249, 77 A.2d 439 (1951); Estate of Dulles, 494 Pa. 180, 431 A.2d 208 (1981); Auwers, Equal Protection and the Illegitimate Child, 21 Hous.L.Rev. 229 (1984).

In Pennsylvania, however, the General Assembly has eliminated the legal distinction (an discrimination) between "legitimate" and "illegitimate" children. The General Assembly has declared "That all children shall be legitimate irrespective of the marital status of their parents and in any and every case where children are born out of wedlock they shall enjoy all the rights and privileges as if they had been born during the wedlock of such parents, except as otherwise provided in Title 20 Pa.C.S." Act of June 17, 1971, P.L. 175, No. 17 § 1, as amended by Act of November 26, 1978, P.L. 1216, No. 288, 48 Pa.Stat.Ann. § 167 (Purdon's supp. 1989). The Probate, Estates and Fiduciaries Code, 20 Pa.C.S.A. § 2107, provides that, for purposes of descent, a child born out of wedlock is always a child of the mother, and is a child of the father when the identity of the father has been established in one of three ways: (1) where the parents of a child born out of wedlock shall have married; (2) where the father is "estopped" from denying paternity because of his conduct; and (3) where clear and convincing evidence exists as to who was the father of the child.

Since the legal distinction between "legitimate" and "illegitimate" children has now been eliminated in the Commonwealth by statute, the phrase "presumption of legitimacy" is now meaningless. Thus, this Court will no longer use the phrase "presumption of legitimacy" to describe the "presumption that a child born to a married woman is a child of the marriage." and therefore of the woman's husband. Other jurisdictions have changed their legal nomenclature to eliminate references to "illegitimate" children. See, e.g., California Uniform Parentage Act, 1975 Cal.Stats., ch. 1244, § 13, Cal.Civ.Code Ann. § 7000 et seq. (West 1983) (adopting language "presumed to be a child of the marriage"); New York General Construction Laws, Art. 2, § 59 (substituting term "child born out of wedlock" for all references in statutes, ordinances, regulations, judicial proceedings, orders, decrees, etc. to "bastard" or "illegitimate child"); Florida Statues, Ch. 89-61, Act of June 16, 1989, an act relating to statutory nomenclature to remove references to "illegitimate" children, and substitute "children born out of wedlock"); Schaffer

presumptions known to the law. Cairgle v. American Radiator Standard Sanitary Corp., 366 Pa. 249, 77 A.2d 439 (1951); Minnich v. Rivera, 509 Pa. 588, 506 A.2d 879 (1986); Commonwealth ex rel. O'Brien v. O'Brien, 390 Pa. 551, 136 A.2d 451 (1958). This presumption (which we will henceforth refer to as the presumption that a child born to a married woman was the child of that marriage) could traditionally be overcome only by proof that the husband did not have access to

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v. Schaffer, 187 Conn. 224, 226, 445 A.2d 589 (1982) (judicially adopting terminology/presumption that a child born during wedlock is a child of the husband).

his wife during the period of possible conception, or by proof of the husband's impotency or sterility. See, e.g., Michael H. v. Gerald D., U.S. , 109 S.Ct. 2333, 2342-43 (1989); Commonwealth ex rel. O'Brien v. O'Brien, supra; Cairgle, supra; Burston v. Dodson, 216 Pa. Super. 11, 390 A.2d 216 (1978). The trial court correctly held that appellee, the alleged or putative father in this case, had introduced no evidence that would come close to overcoming the presumption that the Child was a child of the marriage under the traditional standards.

Superior Court acknowledged that the presumption that a child born to a married woman is a child of the marriage is an extremely strong one, and can only be overcome by clear and convincing evidence to the contrary. 377 Pa. Super. at , 546 A.2d at 1165, citing Burston v. Dodson, supra at 11, 390 A.2d at 221. Superior Court also acknowledged that much must be left to the discretion of the court in its determination of "good cause" to compel a person to submit to a physical examination under Rule 4010(a). 377 Pa. Super at , 546 A.2d at 1167. Nevertheless, the Superior

Court reversed the lower court, holding that the Uniform Act on Blood Tests to Determine Paternity (the Act), 42 Pa.C.S.A. § 6131-37 (effective June 27, 1978) "relaxed" the presumption "to some extent," id. at , 546 A.2d at 1165, and therefore established "good cause" as a matter of law for an alleged biological father to compel the "presumptive father," i.e. the husband, to submit to blood tests.

Superior Court's reasoning was: (1) an alleged biological "unwed" father has procedural and substantive rights to due process and equal protection of laws, and

must be afforded the same opportunity to litigate his assertion of paternity of a child as anyone else; and (2) appellee herein could only rebut the presumption by clear and convincing scientific evidence (blood tests) establishing that appellant-husband was not the biological father. 377 Pa. Super. at , 546 A.2d at 1167-68. Thus, Superior Court conducted the "good cause" balance of interests differently than did the trial court in concluding that, when appellee's "need for the information which can only be supplied by testing is balanced against a party defendant's right of

privacy, the scales weigh heavily in favor of court ordered testing." 377 Pa. Super. at , 546 A.2d at 1168.

The Superior Court over-emphasized the extent to which the Act "relaxes" the presumption of the husband's paternity, and gave minimal consideration not only to appellant-husband's right to privacy, but also to the Commonwealth's interests as expressed in and protected by said presumption.

It is true that the Act relaxes the presumption "to some extent" for it explicitly provides that the presumption "is overcome if the court finds that the

conclusions of all the experts as disclosed by the evidence based upon the tests show that the husband is not the father of the child." 42 Pa. C.S.A. § 6137. Nixon v. Nixon, 354 Pa. Super. 232, 511 A.2d 847 (1986). However, the Act does not relax the presumption to the extent that a "putative father," a third party who stands outside the marital relationship and attempts to establish paternity over a child born to the marriage, may compel the "presumptive father," the husband, to submit to blood tests on the strength of such evidence as has been presented herein.

Indeed, section 6133 of the Act does not give the putative father the right to compel a presumptive father (husband) to submit to blood tests. That section provides: "In any matter . . . in which paternity . . . of a child is a relevant fact, the court . . . upon motion of any party . . . shall order the mother, child, and alleged father to submit to blood tests." 42 Pa. C.S.A. § 6133. Superior Court has previously interpreted Section 6133 as affording no right to an "alleged father" in appellee's situation to compel a "presumptive" father-husband to submit to a blood test. Burston v.

dodson, supra at 11, n. 10, 390 A.2d at 220, n.10.

If appellee's "right" to compel the presumptive father to submit to blood tests cannot be found in the Act, where can it be found? The Superior Court gleaned such right from those cases holding that an unwed father has procedural and substantive due process rights and cannot be denied access to the courts to prove or disprove his paternity or to assert his interests as a parent. 377 Pa. Super at , 546 A.2d at 1167 (see cases cited therein). It is true, of course, that an alleged or unwed

father has such rights and that the state cannot deny them. See, e.g., Adoption of Walker, 468 Pa. 165, 360 A.2d 603 (1976); Stanley v. Illinois, 405 U.S. 645 (1972). The lower court did not, however, deny appellee any such rights in this case.

The Superior Court over-emphasized the rights and interests of the alleged father and minimized the rights and interests of others involved in and affected by its decision, namely the mother, her husband, the family unit and the Commonwealth. When we factor-in those rights and interests, we find that the scales weigh heavily in this case in

favor of appellants and against court-ordered blood tests.

With the possible exception of compelling appellant-husband to submit to blood tests, appellee has had every opportunity to present his case and to question the paternity of the Child in a full and fair proceeding. When considering appellee's need for such evidence, we must place its potential evidentiary value in context of all the rest of the evidence, and we must remain mindful that such blood tests are not conclusive, but are merely some (although sometimes, perhaps, very important)

evidence of paternity. Smith v. Shaffer, 511 Pa. 421, 515 A.2d 527, 529 (1986) (99.99% probability of paternity not conclusive), and see Superior Court cases cited therein with approval.

The right of any person to question paternity is not without limitation, and must be considered along with the rights of the person whose blood sample is sought. Adoption of Young, 469 Pa. 141, 148, 364 A.2d 1307 (1976). The right of privacy of each individual is protected by the Constitutions of the United States and by this Commonwealth. See, e.g., Boettinger v. Loverro, 521 Pa. 366, 555

A.2d 1234 (1989); Commonwealth v. Platou, 455 Pa. 858, 312 A.2d 29 (1973), cert. denied, 417 U.S. 976 (1974); Lunderstat v. Pennsylvania House of Representatives Select Committee, 513 Pa. 236, 519 A.2d 408 (1986); Commonwealth v. Sell, 504 Pa. 46, 470 A.2d 457 (1983). Of course, an individual's right to privacy is not absolute; however, where a person asserts a legitimate expectation of privacy, that expectation of privacy cannot be violated without a judicial balancing of respective interests and a judicial determination that the government or other private party has compelling needs

and interests which justify the invasion of privacy. See, e.g., Commonwealth v. Sell, supra; Denoncourt v. commonwealth, State Ethics Commission, 504 Pa. 191, 470 A.2d 945 (1983); Commonwealth v. DeJohn, 486 Pa. 32, 403 A.2d 1283 (1979); In Re 1979 Allegheny County Investigating Grand Jury, 490 Pa. 143, 415 A.2d 73 (1980); Commonwealth v. Hayes, 489 Pa. 419, 414 A.2d 318 (1980); Vogel v. W.T. Grant Co. 458 Pa. 124, 327 A.2d 133 (1974).

The person whose blood is sought has clear privacy interests in preserving his or her bodily integrity, and the constitutional right to be free from

unreasonable searches and seizures. See, e.g., Koleski v. Park, 363 Pa. Super. 22, 525 A.2d 405 (1987); Burston v. Dodson, supra; Schmerber v. California, 384 U.S. 757 (1966). While the rights and interests of a person whose blood sample is sought are also not absolute, neither are they insubstantial, and they must be taken into consideration by a court in determining whether there is "good cause" for court-ordered blood tests under Rule 4010(a).

There are other interests at stake in this case besides those of appellant-husband and appellee-putative father.

Obviously, the needs and interests of appellant-wife/mother are on a par with the "putative" and "presumptive" fathers. There is, in short, a family involved here. A woman and a man who have married and lived together as husband and wife, giving birth to and raising four children, have obvious interests in protecting their family from the unwanted intrusions of outsiders (even ones who have had serious relationships with the mother, father or children). The Commonwealth recognizes and seeks to protect this basic and foundational unit of society, the family, by the

presumption that a child born to a woman while she is married is a child of the marriage. Commonwealth ex rel. O'Brien v. O'Brien, supra.

We see Commonwealth/family interests highlighted by the "estoppel" cases. In these cases, it is recognized that, under certain circumstances, a person might be estopped from challenging paternity where that person has by his or her conduct accepted a given person as father of the child. The classic example of this principle is where a man who has lived with a woman and her children for a number of years and has held himself to

the world as the father of said children, may be estopped from seeking court-ordered blood tests in a belated attempt to deny paternity. Commonwealth ex rel. Weston v. Weston, 201 Pa. Super. 554, 193 A.2d 782 (1963), cited with approval in Adoption of Young, supra at 469 Pa. 148-49. These estoppel cases indicate that where the principle is operative, blood tests may well be irrelevant, for the law will not permit a person in these situations to challenge the status which he or she has previously accepted. See, e.g., Commonwealth ex rel. Palchinski v. Palchinski, 253 Pa. Super. 171, 384 A.2d

1285 (1978); Commonwealth ex rel. Gonzalez v. Andreas, 245 Pa. Super. 307, 369 A.2d 416 (1976).

The General Assembly has codified the principle of "paternity by estoppel" in its Act of June 17, 1971, P.L. 175, No. 17, § 1, as amended by Act of November 26, 1978, P.L. 1216, No. 288 § 1, 48 Pa. Stat. Ann. § 167 (Purdon's Supp. 1989) (hereinafter referred to as "section 167"), which provides:

> **Children; legitimacy; determination of paternity**
>
> (a) Be it enacted by the Senate and House of Representatives of the Commonwealth of Pennsylvania in General Assembly met, and it is hereby enacted by the authority of the same, That all children shall be

legitimate irrespective of the marital status of their parents and in any and every case where children are born out of wedlock they shall enjoy all the rights and privileges as if they had been born during the wedlock of such parents, except as otherwise provided in Title 20 Pa.C.S.

(b) For purposes of prescribing benefits to children born out of wedlock by, from and through the father, paternity shall be determined by any one of the following ways:

(1) If the parents of a child born out of wedlock shall have married each other.

(2) If during the lifetime of the child, the father openly holds out the child to be his and receives the child into his home, or openly holds the child out to be his and provides support for the child which shall be determined by clear and convincing evidence.

(3) If there is clear and convincing evidence that the man was the father

> of the child which may include a prior court determination of paternity.

See also 20 Pa. C.S.A. § 2107 (b)(2).

The Superior Court has applied section 167(b)(2) to preclude a father from introducing blood tests to disprove paternity where that father was designated as the child's father on the birth certificate, father and mother were subsequently married, lived together as a family and had another child, and father did not contest the child's paternity until five years after his birth when the couple was separated. In Re Montenegro, 365 Pa. super. 98, 528 A.2d 1381 (1987).

In that case, the Superior Court stated that, even though the blood tests demonstrated the appellant therein was not the biological father, that finding "is a nullity and provides no basis upon which the father can deny paternity . . . ." Id. at , 528 A.2d at 1382. Superior Court read section 167 as providing:

> a strong policy statement by the legislature that children shall be legitimate, and when putative fathers hold themselves out to be the father of the child, by marrying the mother and assuming responsibility for the care of the child . . . paternity is thereby determined . . . Since the requirements of the law had been met to establish paternity, the father was estopped from denying paternity five years later. Evidence of the blood tests, therefore, was

inadmissible to disprove paternity for any purpose.

Id. at , 528 A.2d at 1384 (emphasis added).

In the case most analogous to the case at bar, the estoppel principle was applied in Adoption of Young, 469 Pa. 141, 364 A.2d 1307 (1976), to bar the mother from questioning the paternity of her son. In Young, the mother of the child (the former Mrs. Young), and her second husband filed a petition seeking to involuntarily terminate the parental rights of Mr. Young. Mr. Young, the first husband, was married to the mother when she gave birth to the child, lived

with the mother and child for five months thereafter, and then financially supported the child and treated him as his son. The petition to terminate claimed that the former Mrs. Young (mother of the child) and her second husband had been having frequent sexual intercourse at the time of conception, alleged that the second husband was the father, and requested the court to order Mr. Young to submit to blood tests. This Court held:

> Prior appellate case law reviewing authorization of court-ordered blood tests under the 1961 Uniform Act . . . has dealt with situations where husbands seeking to avoid support obligations by denying paternity petitioned for the taking of blood

> grouping tests. We believe the Superior Court's decisions in the [estoppel cases] however are applicable to [appellant-mother's] present appeal.
>
> Were the situation reversed and appellee Young to answer today in a proceeding against him seeking to enforce support payments for the minor child . . . there is no doubt that the doctrine of estoppel would prevent his belated questioning of paternity.
>
> . . . The doctrine of collateral estoppel most certainly acts to bar appellant [-mother's] present action questioning the paternity of her son.

469 Pa. at 150-52. See also Seger v. Seger, 377 Pa. Super. 391, 547 A.2d 424 (1988).

These estoppel cases are not precisely on point, for it does not seem

that appellee herein took any action through the years that was inconsistent with his assertion that he is the biological father of the child in question. However, the presumption that a child born to a married woman is a child of the marriage is as strong a legal precept as is the principle of "paternity by estoppel," especially under all of the circumstances presented herein which only go to buttress that presumption. The Commonwealth is certainly able to recognize this presumption, and has substantial interests in preserving the rights,

obligations and other consequences flowing from said presumption. See Michael H. v. Gerald D., U.S. , 109 S.Ct. 2333 (1989).

It is clear, therefore, that the trial court was correct in finding that no good cause existed to compel appellant-husband to submit to a blood test to "establish" paternity. In the eyes of the law, paternity had already been established by the presumption that the Child is the child of the marriage of Paula and Michael T., Commonwealth ex rel. O'Brien v. O'Brien, supra at 390 Pa. 555, and appellee has offered "not one

iota of evidence" that is adequate in law to shake that presumption. In law and in fact, appellant-husband Michael T. is the Child's father, and no one can henceforth dispute or challenge that fact.

Order of the Superior Court is reversed; the Order of the Court of Common Pleas of Delaware County is hereby reinstated.

Mr. Chief Justice Nix joins this opinion of the court and files a concurring opinion.

Mr. Justice Flaherty joins this opinion of the court and also joins in Mr. Chief Justice Nix's concurring opinion.

Mr. Justice McDermott joins in this opinion of the court and also joins in Mr. Chief Justice Nix's concurring opinion.

Mr. Justice Zappala joins in this opinion of the court and also joins in Mr. Chief Justice Nix's concurring opinion.

Mr. Justice Papadakos joins in this opinion of the court and also joins in Mr. Chief Justice Nix's concurring opinion.

APPENDIX "B"

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

JOHN M.,	:	No. 31 E.D. Appeal
	:	Docket 1989
Appellee	:	
	:	Appeal from the Judgment
v.	:	of the Superior Court,
	:	Entered on August 1 and
PAULA T., and	:	1988, at No. 2425 Phil.
MICHAEL T.,	:	1987, reversing the
	:	Judgment and Order of
	:	Appellants the Court of
	:	Common Pleas of Delaware
	:	County at No. 85-6320
	:	
	:	377 Pa. Super. 72, 546
	:	A.2d 1162 (1988)
	:	
	:	ARGUED: DECEMBER 12,
	:	1989

CONCURRING OPINION

NIX, C.J. Filed: March 19, 1990

I join in the opinion and result of the majority. I write separately to

emphasize that this Court has not swayed from the presumption that a child born to a married couple is presumed to be a "child of the marriage."

Irrespective of the legal title given this presumption (whether it be "presumption of legitimacy" or the presumption that the child born is the "child of the marriage"), it should remain clear that a child born to a married couple will be presumed to be the issue of the husband. That presumption can be overcome only by proof of facts establishing non-access or impotency. Cairgle v. American Radiator and Standard

Sanitary Corp., 366 Pa. 249, 77 A.2d 439 (1951). It continues to be one of the strongest presumptions within our law. Commonwealth ex rel. Leider v. Ledier, 434 Pa. 293, 254 A.2d 306 (1969); Cairgle, supra; Commonwealth ex rel. O'Brien v. O'Brien, 390 Pa. 551, 136 A.2d 451 (1958).

In this case a third party disputes the paternity of the husband and asks the court to compel the presumed father to submit to a blood test in order to determine who is more likely the father. The lower court properly denied the request, relying upon the "presumption of

legitimacy". However, the Superior Court found that the Uniform Act on Blood Tests to Determine Paternity ("the Act"), 42 Pa. C.S. §§ 6131-37, relaxed the presumption, therefore enabling the alleged putative father to establish "good cause" to compel a blood test of the husband under Pa.R.Civ.P. 4010(a).

The Superior Court erred for the presumption is absolute. The Act does not relax the presumption that a child born to a marriage is a "child of the marriage"; it merely provides a mechanism through which an <u>alleged</u> father can accumulate evidence of paternity. This

Act cannot be used by a third party, seeking to rebut the presumption, to compel a presumed father to submit to a blood test. Whatever interests the putative father may claim, they pale in comparison to the overriding interests of the presumed father, the marital institution and the interests of this Commonwealth in the family unit. These interests are the cornerstone of the age-old presumption and remain protected by the Commonwealth today.

Thus a third party who stands outside the marital relationship should not be allowed, for any purpose, to challenge

the husband's claim of parentage. I believe the presumption in this situation is irrebuttable and conclusive, the statutory provision cited in the majority opinion notwithstanding. The thrust of the presumption is to establish Michael T. as the legally recognized father of the child in question, without regard to the legitimacy of its biological premise.[1]

Mr. Justice Flaherty, Mr. Justice McDermott, Mr. Justice Zappala and Mr.

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[1]It would also follow that appellee is not entitled to compel either the mother or the child to undergo testing.

Justice Papadakos join in this concurring opinion.

APPENDIX "C"

JOHN M., Appellant	:	**IN THE SUPERIOR COURT OF PENNSYLVANIA**
v.	:	
PAULA T. and **MICHAEL T.,** Appellees	:	No. 2425 Philadelphia, 1987

JUDGMENT

On Consideration Whereof, it is now here ordered and adjudged by this Court that the judgment of the Court of Common Pleas of Delaware County be, and the same is hereby REVERSED AND REMANDED FOR FURTHER PROCEEDINGS. JURISDICTION RELINQUISHED.

By The Court:

/s/
Prothonotary

Dated: August 18, 1988

JOHN M.,	:	**IN THE SUPERIOR COURT OF**
Appellant	:	**PENNSYLVANIA**
	:	
v.	:	
	:	
PAULA T. and	:	
MICHAEL T.,	:	No. 2425 Philadelphia,
Appellees	:	1987

Appeal from Order of the Court of Common Pleas, Civil Division, of Delaware County, No. 85-6320.

BEFORE: ROWLEY, WIEAND and MONTEMURO, JJ.

OPINION BY WIEAND, J.:

The principal issue in this appeal is whether a plaintiff who claims to be the biological father of a child born to a married woman can compel the mother's husband, who is a party to the action, to

submit to Human Leukocyte Antigen (HLA) testing to assist the court in determining paternity. In the instant case, the trial court refused to order such testing and determined, after hearing, that plaintiff had failed to overcome the presumption of legitimacy which attached to the child's birth during coverture. From the dismissal of his complaint seeking to enforce visitation, the plaintiff appealed.

John M. and Paula T. met at work and began to see each other socially in September, 1977. By early 1978, they had become sexually intimate. Paula was then

engaged to marry Michael T. Nevertheless, the relationship between John and Paula continued. John testified that they had discussed Paula's calling off the marriage but that Paula had declined, saying her parents ". . . could kill her if she called it off." In any event, the relationship came to an end in August, 1978, and Paula, in September, 1978, was married to Michael T. In March, 1979, however, Paula and John resumed their sexual liaison. On June 6, 1989, Paula gave birth to her first child. John has not claimed to be the father of this child.

After her first child had been born, Paula again renewed her affair with John. During January and February, 1981, they met several times in motels, where they engaged in sexual intercourse without birth control protection. In March, 1981, aula discovered that she was pregnant, and on November 3, 1981 a second child, H.T., was born. During this pregnancy, according to John's testimony, Paula said that she thought John was the father of the child, and they discussed Paula's getting a divorce from her husband. John also said that on the day when Paula went to the hospital,

she called him before and after H.T.'s birth to arrange a time for John to visit. John produced photographs of the baby which, he said, he had taken during his hospital visit. After H.T.'s birth the relationship between John and Paula was again renewed and continued until September, 1983, when it was terminated. Between November, 1981, and September, 1983, according to John, he continued to visit H.T. He also produced cards which had been sent to him by Paula, including a Father's Day card which contained H.T.'s name. He also offered photographs of mother and child which, according to

his testimony, he had taken on the various occasions on which he had visited Paula and H.T. The only reason he had not contributed to the child's support, he said, had been Paula's fear of being unable to explain the source of the money to her husband. Meanwhile, John opened a trust account for H.T.

In 1984, after their intimate relationship had come to an end, Paula refused to allow John to see the child. She admitted, when called as of cross-examination, that she had had intercourse with John in early 1981, but said that she could not recall any discussion with

him about the possibility of his being the father and denied any discussion about her getting a divorce. She said that the last occasion on which they had had intercourse had been in December, 1981. She also denied that John had visited her at the hospital after H.T.'s birth but conceded that she had sent a Father's Day card. She explained that John had been a friend whom she wished to cheer up. She denied any knowledge that John was claiming to be H.T.'s father.

In December, 1984, Paula, her child, and John submitted to HLA testing. The results, as interpreted by an expert

whose deposition and report were admitted at the hearing, showed a 97.471% probability that John was the natural father as compared to a random male. The test also showed that he was 38 times more likely to provide the required genes for the child than a random male. The expert concluded that this percentage was "in the mid range of results" compared to test results in other cases "in which the alleged father was not excluded."

Michael T. did not participate in a blood test to determine paternity. He testified that he and his wife had never been separated and had engaged regularly

in sexual intercourse. During December, 1980 and January and February, 1981, they had engaged in marital relations three or four times a week. He testified that he had been at the hospital when H.T. had been born and had assisted in her delivery. He said he was certain that he was H.T.'s father.

The trial court determined that John had failed to overcome the presumption of legitimacy and denied relief. Post-trial motions were denied, and this appeal followed.[1]

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[1]The trial court's original order also denied John M.'s request for visitation on grounds that it would not be in the child's best interests to allow such visits. This

The presumption of legitimacy is one of the strongest presumptions in the law. Mafredi Estate, 399 Pa. 284, 159 A.2d 697, 699 (1960). See also: Connell v. Connell, 329 Pa.Super. 1, 6, 577 A.2d 872, 875 (1984). Until recently, the presumption could be overcome only by evidence of overwhelming weight "establishing non-access or that the husband was impotent or had no sexual

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was removed and eliminated from the trial court's amended order. It is nevertheless clear from the amended order that appellant has been put out of court without relief. Therefore, the court's order is final and appealable. Gordon v. Gordon, 293 Pa.Super 491, 439 A.2d 683 (1981), affirmed, 498 Pa. 570, 449 A.2d 1378 (1982).

intercourse with his wife at any time when it was possible in the course of nature for the child to have been begotten." Commonwealth ex rel. Ermel v. Ermel, 259 Pa.Super. 219, 221, 393 A.2d 796, 797 (1978), quoting Cairgle v. American Radiator & Standard Sanitary Corp., 366 Pa. 249, 255, 77 A.2d 439, 442 (1951) (citations omitted). The presumption is not overcome by showing that the wife was living in adultery unless non-access of her husband can also be shown. Cairgle v. American Radiator & Standard Sanitary Corp., supra at 256, 77 A.2d at 442. Since the adoption in

Pennsylvania of the Uniform Act on Blood Tests to Determine Paternity, 42 Pa.C.S. §§ 6131 et seq., the presumption of legitimacy has been relaxed to some extent. Thus, the provisions of 42 Pa.C.S.A. § 6137 permit the presumption of legitimacy to be overcome by blood tests which exclude the mother's husband as the possible father.[2] See: Nixon v. Nixon, 354 Pa. Super. 232, 511 A.2d 847

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[2]This section provides as follows:

> The presumption of legitimacy of a child born during wedlock is overcome if the court finds that the conclusions of all the experts as disclosed by the evidence based upon the tests show that the husband is not the father of the child.

(1986). Nevertheless, to defeat the presumption of legitimacy there must be evidence which is clear and convincing. Burston v. Dodson, 257 Pa.Super. 1, 11, 390 A.2d 216, 221 (1978). Cf. Williams V. Milliken, 351 Pa. Super. 565, 506 A.2d 918 (1986).

In the instant case, there was not one iota of evidence to show that Michael T. could not be H.T.'s father. The trial court accepted and found credible his testimony that, during the period in which conception had occurred, he and Paula had been living together as husband and wife and had engaged in sexual

intercourse several times a week. Moreover, there was no evidence that Michael had been sterile or impotent. Finally, there were no blood tests which excluded the husband as father of H.T.

John contends that the results of the blood tests to which he, the mother, and the child submitted tend to show that he is the father of the child and not the mother's husband. However, these blood tests are only a part of the evidence. They do not exclude Michael but merely show a degree of probability that John is the father.

> 42 Pa.C.S.A. § 6136 (Uniform Act on Blood Tests to Determine Paternity) provides that if all experts agree

> that blood tests exclude a defendant as a possible father, the question of paternity is to be resolved accordingly. Absent a legislatively enacted provision making positive blood tests also conclusive, we must view them as only part of the evidence.

Turek v. Hardy, 312 Pa. Super. 158, 163 n.6, 458 A.2d 562, 565 n.6 (1983)(emphasis added). Therefore, the results of appellant's blood tests are to be deemed only one factor which may be considered by the court in making its determination. Nixon v. Nixon, supra at 238 n.5, 511 A.2d at 850 n.5.

The other factors relied upon by appellant to overcome the presumption of legitimacy included the longstanding

relationship between him and Paula, acts of sexual intercourse within the time-frame of H.T.'s conception, and his testimony that the mother had indicated her belief that he was the child's father. We agree with the hearing court that this evidence, even in conjunction with the HLA test results, was insufficient to overcome the presumption that Michael T. was H.T.'s father.

Acting pursuant to Pa.R.C.P. 4010(a), appellant requested the trial court to order Michael to submit to HLA testing.[3]

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[3]Blood tests are also authorized by 42 Pa.C.S. § 6133 as follows:

Authority for test

> In any matter subject to this subchapter in which paternity, parentage or identity of a child is a relevant fact, the court upon its own initiative or upon suggestion made by or on behalf of any person whose blood is involved may, or upon motion of any party to the action made at a time so as not to delay the proceedings unduly, shall order the mother, child and alleged father to submit to blood tests. If any party refuses to submit to such tests, the court may resolve the question of paternity, parentage or identity of a child against such party, or enforce its order if the rights of others and the interests of justice so require.

In Burston v. Dodson, supra at 10 n.10, 390 A.2d at 220 n.10, it was questioned whether the authority given to a court to order an "alleged father" to submit to blood test included authority to compel a "presumed father" to submit to testing. It may be that this issue prompted appellant to base his request for testing on Pa.R.C.P. 4010(a).

This petition was denied. Appellant argues that this was error.

Pa.R.C.P. 4010(a) provides as follows:

> When the mental or physical condition (including blood group) of a party, or of a person in the custody or under the legal control of a party, is in controversy, the court in which the action is pending may order the party to submit to a physical or mental examination by a physician or to produce for examination the person in his custody or legal control. The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions and scope of the examination and the person or persons by whom it is to be made.

This rule, however, does "not apply to . . . an action for custody of minor children except to the extent prescribed

by the rules governing [that] action [ ]." Pa.R.C.P. 4001(a)(2).

Pa.R.C.P. 1915.5(c), which governs actions for custody and visitation, provides that "[t]here shall be no discovery unless authorized by special order of court." The purpose for this limitation appears in the explanatory Note to Rule 4001 as follows:

> The amendment excludes any automatic right to discovery in support proceedings. . . . To avoid the possibility of a defendant spouse using discovery as a tool for harassment, abuse and delay, the amendment requires leave of court in all support proceedings. <u>This should be freely given where it is essential to a just disposition of the matter</u>.
>
> Proceedings for custody of minor children are subject to the same

provision for leave of court. (emphasis added).

It is apparent from these rules that blood grouping tests are available in custody and visitation proceedings only by leave of the court in which the action is pending. Where "good cause" is shown, however, leave of court should be freely given to insure a just disposition of the matter. The requirement of "good cause" is not merely a formality. Rather, it is a limitation upon the right to compel a litigant to submit to the test. As such, it entails more than mere relevancy. Whether "good cause" exists will vary according to the circumstances of each

case. The ability of the petitioning party to obtain the information by other means is a significant consideration. To show good cause, the condition as to which examination is sought must genuinely be in controversy, and it must appear that the examination will substantia ' aid in resolving the dispute. N ertheless, much must be left to the discretion of the court to which the petition is presented. See: Schlagenhauf v. Holder, 379 U.S. 104, 85 s.Ct. 234, 13 L.Ed.2d 152 (1964)(interpreting good cause

requirement of Federal Rule of Civil Procedure No. 35).

In the instant case, the trial court denied appellant's request because the presumption of legitimacy had not been overcome by appellant's evidence and, therefore, court ordered testing would constitute an invasion of the husband's privacy. This reasoning, we believe, was faulty.

This Court has held that a putative father has standing to litigate a claim that he is the biological father of a child born to a woman while she was married to another, who is presumed to be

the child's father. See Williams v. Milliken, supra. Having recognized the right of the putative father to litigate his claim, however, we cannot then take away from him the same right to prove his claim as other litigants enjoy. Guarantees of due process and equal protection command that the courts shall not create artificial barriers which will make it impossible for a contending biological father to litigate his private interest in a child whom he allegedly has sired. Cf. R. McG. v. J.W., 200 Colo. 345, 615 P.2d 666 (1980)(statute which deprived putative father of access to

courts to assess claim of paternity violates principles of equal protection); Anonymous v. Anonymous, 472 So.2d 640 (Ala.Civ.App. 1984)(putative father of child born to married woman is entitled to opportunity to present evidence to rebut presumption that mother's husband was father). Thus, it seems clear that Pa.R.C.P. 4010(a) must be applied evenhandedly and, indeed, ungrudgingly, in the case of a putative father who is required to rebut a presumption of legitimacy in order to establish his claim of paternity in the case of a child born to a married woman. Although the

Commonwealth unquestionably has an interest in strengthening family life and in affording legitimacy to children; these interests can adequately be protected by the presumption of legitimacy.

To the extent that the allowance of blood testing is a policy issue, moreover, that policy has been established in favor of the putative father's claim of paternity by the legislature. This follows by necessary implication from the enactment of 42 Pa.C.S. § 6137, which permits the

presumption of legitimacy to be overcome by the use of blood grouping tests.

In the instant case, appellant can only rebut the strong presumption of legitimacy by clear and convincing evidence that Michael cannot be the biological father of H.T. Absent proof of non-access or impotency on the part of the mother's husband during the time-frame of conception, the only evidence which can rebut the presumption of legitimacy is scientific testing which excludes Michael's paternity. The HLA test has been recognized as a reliable technique. Turek v. Hardy, supra at 161,

458 A.2d at 564. Rule 4010, although it requires a showing of good cause, does not require that the movant prove his case prior to the ordering of blood tests. See: Schlagenhauf v. Holder, supra. Had petitioner been able to overcome the strong presumption of legitimacy with evidence otherwise available to him, he would have had no need for medical evidence.

In the instant case, appellant cannot hope to prove his claim without scientific testing. No other evidence sufficient to overcome the presumption of legitimacy is available to him. Of

course, the HLA tests which he has requested may also be inadequate to demonstrate that Michael is not the natural father and overcome the presumption of legitimacy. Nevertheless, it is patently clear that the test is crucial to appellant's claim. Without it he cannot hope to prove his claim and is out of court. We conclude, therefore, that he established "good cause" for an order directing Michael to submit to HLA testing. When appellants' need for the information which can only be supplied by testing is balanced against a party defendant's right of privacy, the scales

weigh heavily in favor of court ordered testing. When the trial court, nevertheless, refused to order the tests, it abused its discretion.

The trial court, understandably, was concerned about the effect of its ultimate decision on the welfare of the child. That concern, however, cannot be permitted to bar appellant's right to attempt to prove his claim of paternity. It may be that the requested testing will not exclude the possibility of Michael's parentage. In that event, appellant's claim will undoubtedly fail. On the other hand, even if appellant is able to

overcome the presumption of legitimacy, the trial court has not received evidence or heard argument as to whether appellant's asserted right to visit the child will be in the child's best interest. We hold only that appellant cannot be precluded from litigating his claim of paternity consistently with procedural rules applicable to other litigants for whom the courts are open.

Reversed and remanded for further proceedings consistent with this opinion. Jurisdiction is not retained.

APPENDIX "D"

IN THE COURT OF COMMON PLEAS OF DELAWARE COUNTY, PENNSYLVANIA CIVIL ACTION - LAW

JOHN MILLER, Plaintiff	:	NO. 85-6320
v.	:	
PAULA TOMLINSON and **MICHAEL TOMLINSON,**	:	CUSTODY/ VISITATION

Steven B. Moss, Esquire, for Plaintiff
Chester P. Confer, Esquire, for Defendant Paula Tomlinson
Scott D. Galloway, Esquire, for Defendant Michael Tomlinson

O P I N I O N

WRIGHT, J. FILED: NOVEMBER 12, 1987

John Miller (Plaintiff) filed a "Petition for Partial Custody or Visitation".[1] A hearing was held on the

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[1]Pa. R. Civil P. No. 1915.15 provides that the caption of a custody action shall

issue of whether Plaintiff is the natural father of Heather Tomlinson (Child) born November 3, 1981. After the hearing an Order was entered refusing to order Defendant, Michael Tomlinson (Husband) husband of the natural mother to submit to a blood test and determining that Plaintiff had not overcome the presumption of legitimacy. The natural mother, Paula Tomlinson (Mother) was also named as a Defendant. The Plaintiff appealed to the Superior Court of Pennsylvania, necessitating the writing of this Opinion.

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be Plaintiff vs. Defendant, etc.

We are of the opinion that the appeal to the Superior Court should be dismissed. Not having decided the issue of custody or visitation we believe that the Order is interlocutory and therefore not appealable.

In the event that the Superior Court determines that the Order is appealable we will herein give our reasons for deciding that Plaintiff has not overcome the presumption of legitimacy and that Husband is the father of the child.

We believe this case is unique. If not unique it is certainly unusual. Mother and Husband were married in

September 1978. At the time of the hearing they had continuously lived together as husband and wife with no separations.

Plaintiff testified he first met Mother at their place of employment in September of 1977. At the time they were both unmarried. Their relationship began by having lunch together and after the office Christmas party in 1977 he took her home. She lived with her parents at that time. Other than lunch, that was the first time they had been together outside the office. He testified "And then in early '78 we began seeing each

other." He testified "Well, at first it was lunches, then a dinner out. And then a motel." He testified they went to a motel to have sexual relations in early 1978. He testified that August, 1978 was the last time they had sexual relations before she got married. He testified that before she got married they discussed her calling the marriage off and a life they could have together. She told him her parents ". . . would kill her if she called it [marriage] off." After the marriage they had lunch together at times and he took her home from the 1978 office Christmas party. In

March, 1979 they again began to have sexual relations. They continued the sexual relations through 1980. On June 6, 1980 Mother gave birth to her first child, Stephanie.[2] He testified that prior to her becoming pregnant they had discussed divorce and their being together but that after she became pregnant she felt she could not leave her husband. Up until January, 1981 they used no form of birth control except withdrawal. He testified that on January 16, 1981 they had sexual relations and on

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[2]He is not seeking to be declared the father of Stephanie.

that occasion there was no ". . . protection or withdrawal." He testified that she told him not to withdraw. After she discovered she was pregnant with her second child they discussed the time frame of conception. Child was born November 3, 1981. He testified they had sexual relations the latter part of January, 1981 and just before Valentines Day of 1981. He testified it was in March when she told him she was pregnant. She indicated she thought he was the father and they again discussed her getting a divorce. She told him her child was expected October 31, 1981. He

testified that she called him on the morning she was going to the hospital to give birth to Child and that later in the day she called about a time that he could go to the hospital to visit. He testified the child weighed 8 lbs. 6 oz. at birth and that he saw Mother and Child at the hospital. He testified that after Child was born they had sexual intercourse up until September, 1983. He testified that in 1984 she refused to let him see child and that after several refusals he talked with an attorney. He also testified from a photo album that was entered into evidence. The album

included photographs of Child, her sister Stephanie, and Mother at various locations (parks, his apartment, etc.). In the album is a photograph of Child he alleges was taken by him in the hospital when he went there to visit Mother and Child right after the birth of Child. He testified that Mother agreed to a blood test and that blood tests were taken in December, 1984 with him, Mother and Child participating. He testified he bought gifts for Child but never actually supported Child because Mother said she did not want to be in the position of having to explain where the funds were

coming from. He testified "I opened a trust fund for her [Child]." He testified that to his knowledge Mother was at no time separated from Husband. He testified Mother was the only woman he had sexual relations with from 1978 until after Child was born and that he had not dated anyone except Mother. He produced Father's Day cards, etc., with Child and Stephanie's names on them, letters from Mother to him, etc.

Plaintiff presented a video tape deposition of Dr. William J. Sherwood whose expertise is in the filed of

hematology. Dr. Sherwood testified in part:

> "When we deal with probability of paternity, once we determine that it's possible for the alleged father to be the true father, that is to say we've ruled out on the basis of testing any exclusions, we cannot say with definitiveness that he is in truth the true father."
>
> "We can only give an assessment of probability that he is the true father, and we base that on the gene frequencies we tested. And that's the basis of this calculation. There's another way of expressing that same kind of probability."
>
> "That's called the probability of paternity, which in this cases was 97.47 percent. That is to say he is 97 percent more likely to be the true father of the child than as a random man of the same race."
>
> "Q. Is this, is the 97.471 percent is that a high rating, low rating or neutral rating?"

"A. I would say based on the value, evaluating a large number of paternity tests in which the alleged father was not excluded, in our experience this is perhaps in the mid range of results that one gets in this type of testing. They can vary of course from something very low in the 60's or 70 percent, which is very rare to have something that low, up to something very high to the 99.99999 percentile range."

"Q. I take it there is no 100 percent?"

"A. We, if it were a 100 percent, we could determine with accuracy in the true father of a child, we cannot. We can only determine with that kind of accuracy to the exclusion of a child, or father of a child."

"If we have a gene system here in which the man did not have any paternal obligatory genes, we can say he is not part. In this case we did not find that, so we turned to our secondary logic, that we've said our conclusion is based upon the results

of this testing, he's not excluded. Since he's not excluded, what is the probability that he could be the father as compared to a random man of the same race?"

"Q. Is there a variable of plus or minus when you come up with this 97.471? Is there any reasonable variables?"

"A. Well, there's not standard of deviation or no index of variation that surround the 97.471. And that is the only figure you can develop in terms of developing a probability of statistic. It's a probability statistic and therefore it stands alone."

In the Briefs of both parties the propriety of permitting Dr. Sherwood to testify and give an opinion is discussed. We are satisfied that a proper foundation

was laid and that his testimony was property admitted and considered.

When called to testify as on cross-examination by Plaintiff, Mother testified that Child weighted 5 lbs. 15 oz. at birth and was 21 inches long; that she had intercourse with Plaintiff in the middle of January 1981, that she did not recall having any discussion with Plaintiff about the possibility of him being the father, that she never discussed with Plaintiff about her getting a divorce, that the last intercourse she had with Plaintiff was in December, 1981, that Plaintiff came to

her home around 100:30 p.m. when her husband was not home and told her if she did not take a blood test ". . . he was going to have court action taken upon me." As to sending a Father's Day card and Plaintiff's allegations of hospital visits, she testified:

"A. Yes, I did send him cards"

"Q. Sent, did you send him a Father's Day card in 1982?"

"A. It was a card that said 'To Someone Special on Father's Day'. It wasn't actually a Father's Day card int he sense that he was a father".

"Q. Well, why, why would you have sent him a card on Father's Day at all and signed your daughter's name, I imagine it's your signature?"

"A. Well, I signed, I signed both my daughters' names to it and it was

because he believed, that he, he, he told me, he expressed to me, he felt that he wished he had a family and he seemed like he was depressed, so in being a friend I saw this card in the card store and I thought it would cheer him up. I was friends with him at the time."

"Q. Did you, did you know that he was asserting that he was the father of Heather at that time?"

"A. No, I did not."

"Q. He had never mentioned that to you at all?"

"A. No."

"Q. Did he see you at the hospital after Heather was born?"

"A. He didn't see me. As i saw with the pictures that he had them, but anybody can go in and take pictures of babies. I did not have to see Mr. Miller."

"Q. All right, and you're certain that you did not see Mr. Miller at the hospital after Heather was born?"

"A. I did not see Mr. Miller at the hospital."

She also testified that she did stop by Plaintiff's home after December 1981 but that they were just friendly visits as she considered him a friend. In that regard her testimony was ". . . I don't have to have a physical relationship to see a person that I am friends with." She later testified regarding discussions of Plaintiff's allegations that he is the father:

"Q. Is it your testimony then that out of the blue in 1983 or 1984 that John Miller said that was his

daughter? He had never discussed that with you at all?"

"A. No, he discussed it with me, but I always told him it wasn't true."

"Q. Well, so when did he discuss it? I'm sorry, maybe I missed something."

"A. He discussed it with me. I never discussed it with him. He brought it up."

"Q. Uh huh. Was that during 1981 before you had the child?"

"A. No."

"Q. Right after you had the child?"

"A. Not right after."

"Q. Um, knowing that, well, knowing at some point that he was claiming he was the father did you accept gifts for the children?"

Mother also testified she took the children to Plaintiff's home after he

alleged to her that he is the father of Child. She testified that on one night in January, 1981 she had intercourse with Plaintiff and she also had intercourse with Husband and that during that period of time she and Husband were having sexual relations four to five times a week.

Husband, when called to testify by Plaintiff, testified that he had not participated in a blood test to determine paternity. Later when called to testify by his attorney, Husband testified that from the time of their marriage he and his wife had never been separated, that

they had continued sexual relations and that during December 1980, January and February 1981 they had sexual relations three to four times a week. He testified he had no doubt at all that he is the father of Child. He testified that he was at the hospital when Child was born and that he participated in the delivery.

Plaintiff in his Brief cites Stanely vs. Illinois, 405 U.S. 645, 92 Super. Ct. 1208 (1972) for the proposition that ". . . unwed fathers have cognizable and substantial rights as to their children." The Court does not disagree with that statement and at no time, to the best of

our recollection, have the Defendants disagreed. The rights of an unwed father are not at issue in the proceedings that were before this Court. There is little or nothing in Stanley that bears on the issue before the Court. In Stanely it was conceded that Stanley was the father. The issue there was whether Illinois could deprive Stanley of rights that fathers of children of a marriage have.[3]

Plaintiff filed a Statement of Matters Complained of on Appeal stating:

> 1. The Court erred in finding that Defendant, Michael Tomlinson, should

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[3]If we determined that Plaintiff is the father of Child, then as to visitation and custody Stanley may be relevant.

not be ordered to submit to a blood test since the evidence evinced at trial unequivocally demonstrated that Plaintiff had a 97-471% probability of being the actual father of the child and that Plaintiff and Defendant, Paula Tomlinson, had had a sexual relationship at a time when the child was conceived.

2. The Court erred in finding that there should be no blood test for Defendant, Michael Tomlinson, in violation of Pa. R.C.P. 4010(a).

3. The Court erred in finding that Plaintiff has not overcome the presumption of legitimacy as that finding is against the weight of the evidence adduced at trial.

4. The Court erred in finding that Plaintiff ha snot overcome the presumption of legitimacy since it is clear that unwed fathers have cognizable and substantial rights as to their children.

The trial Judge did not err in refusing to order Husband to take a blood test.[4] Pa. R. Civil P. No. 4010(a) provides that the Court ". . . may order the party to submit to [an] . . . examination . . ." Had our Supreme Court decided to make the examination an absolute right then it would have made it mandatory by using the word "shall" rather than "may". Therefore a Court may use its discretion in determining whether to order an examination.

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[4]Paragraphs No. 1 and 2 of Plaintiff's Matters Complained of on Appeal raise the same issue.

The Court did not abuse its discretion in refusing to order Husband to take a blood test. The explanatory note to Rule 4010 states "Good cause . . ." [is] "intended to protect parties against undue invasion of their rights to privacy." Where a husband is living with his wife, has never separated from her, is the undisputed father of her first child, was having intercourse with his wife three to four times a week when her second child was conceived, was at the hospital and took part in the delivery of the second child, considers himself to be the natural father of both children and

husband, wife and children are living together int he community as a family unit, it certainly is an undue invasion of the husband's right to privacy to order him to take a blood test in proceedings commenced by a person who is alleging that person is the father of the wife's second child.

In Burston v. Dodson, 390 A.2d 216, 257 Pa. Super. 1 (1978) the Court states:

> Not only may the husband with possible access refuse to submit to blood tests but the Trial Court may not consider such failure to submit to such a test.

Plaintiff contends that Burston should not be followed in these proceedings

because it was decided prior to the amendment to Rule 4010(a) which went into effect in 1979. We disagree. We agree with the explanatory note to Rule 4010. The note indicates that the Rule was expanded and now " . . . covers a party and also a person in the custody or legal control of a party". And that "The amendment introduces a specific requirement of 'good cause shown' and notice to all parties and to the person to be examined. Actually, this makes no change in present practice. Good cause and notice were implicit in the prior Rule . . ." We do not believe that the

amendment restricts the following of prior law in this case. Plaintiff did not overcome the presumption of legitimacy.[5] In this Commonwealth there has always been a strong public policy to legitimize a child wherever possible. Fitzpatrick vs. Miller, 196 A 83, 129 Pa. Super. 324 (1938); Rosenburgers Estate, 650 A.2d 377, 362 Pa. 153 (1949).

The presumption of legitimacy is one of the strongest known to the law and can only be overcome by proof of non-access

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[5]As in Paragraphs No. 1 and 2 of Plaintiff's Matters Complained of on Appeal, Paragraphs 3 and 4 in effect raise the same issue.

by a husband or that the husband was impotent. O'Brien vs. O'Brien, 136 A.2d 451 (1957), 390 Pa. Super. 551, Commonwealth Ex Rel Ermel vs. Ermel, 393 A.2d 727, 259 Pa. Super. 222; Cairgle vs. American Radiator Standard Sanitary Corp., 77 A.2d 439, 366 Pa. Super. 249. Plaintiff definitely did not prove or come close to proving non-access or impotency of Husband.

Even shortly after this great nation came into existence it was recognized that in the case of conflicting presumptions on the subject of legitimacy, the presumption of legitimacy

must prevail. See Senser vs. Bower, 1 P & W 45 (1830); Dennison vs. Page, 29 Pa. 4110 (1857).

Not only public policy but the best interest and welfare of this Child requires us to determine that the presumption of legitimacy control. Here we have a child living in a family unit with two adults who she understands are her natural parents and also living in that household is another child who she thinks is her full-blooded sister. How can it now be fully explained to the child that her mother's husband is not her father and that the other child

living in the household is only a half sister? What effect will it have on the child if Mother and Father have another child or children[6] when the child learns that the other children in the household are full-blooded siblings and she is only a half sister. The answer to each question is quite obvious namely a devastating effect on the child.

H.L.A. bloodtests are relevant but are not conclusive. Connell vs. Connell, 477 A.2d 872, 329 Pa. Super. 1 (1984). The testimony that the H.L.A. test

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[6]Defendants Brief indicates Mother is presently pregnant.

indicated that the probability of Plaintiff being father of Child is 97.47 percent is very impressive. But that is not all that Dr. Sherwood testified to. He also testified as follows:

> "Q. Is this, is the 97.471 percent is that a high rating, low rating or neutral rating?"
>
> "A. I would say based n the value, evaluating a large number of paternity tests in which the alleged father was not excluded, in our experience this is perhaps in the mid range of results that one gets in this type of testing."

The testimony concerning mid range makes that 97.47 much less impressive. Ninety-seen point Forty-seven (97.47) percent being in the mid range should not

be and is not such that it overcomes the presumption of legitimacy.

In making the decision the trial Judge observed the photograph of Child and the physical features of Plaintiff and Husband. In comparing the features of the three the trial Judge was unable to conclude that Child resembles Plaintiff more than Child resembles Husband.

The credibility of all witnesses was considered. The trier of fact may accept some of a witness' testimony as being the truth and disbelieve other testimony of the witness. As between Plaintiff and

Mother, Mother was found to be a little more credible than Plaintiff. Husband was found to be an extremely credible witness. It may well be that Mother cannot truthfully say that Plaintiff or Husband is the father of Child. Her statement that she had sexual intercourse with Husband on the same night she had intercourse with Plaintiff was believed by the finder of fact. Her testimony, corroborated by testimony of Husband, that she was more than once weekly having intercourse with Husband around the time of conception as believed by the trier of

fact. In situations such as this the presumption of legitimacy must prevail.

It was for the reasons stated herein that we entered the Order refusing to direct Husband to submit to a blood test, and determining that Plaintiff had not overcome the presumption of legitimacy.

BY THE COURT:

/s/
Robert A. Wright, Judge